IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 8273 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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APTECH LTD.

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 8273 of 2001

MR KB ANANDJIWALA for Petitioner No. 1-4

MR ND GOHIL APP for Respondent No. 1 - State

MR MJ BUDDHBHATTI for Respondent No. 2

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 19/07/2002

C. A. V. JUDGEMENT

1. In this petition which is filed under Section 482 of the Code of Criminal Procedure, 1973 ('the Code' for short hereinafter), petitioners against whom Criminal

Complaint No.918 of 2001 is filed in the Court of learned Chief Metropolitan Magistrate, Ahmedabad in which the process has been issued, have prayed to quash and set aside the said complaint and process issued thereunder on the grounds stated in the petition.

2. A private complaint came to be filed in the Court of learned Chief Metropolitan Magistrate, Ahmedabad by respondent No.2, GDR Securities Limited (hereinafter referred to "GDR" for the sake of brevity and convenience) against petitioner No.1, Aptech Limited (hereinafter referred to as "Aptech" for the sake of brevity and convenience), its Directors and authorized signatory for commission of the alleged offence under Section 138 of the Negotiable Instruments Act ('the Act' for short hereinafter).

2 (i) It is inter alia alleged in the said complaint by the complainant - respondent No.2 herein "GDR" that the complainant had entered into a franchise agreement with Aptech dated 21.9.1996 and in pursuance of the said agreement, GDR had started Asset International Center at B-61, Pariseema Complex, C.G. Road, Near Lal Bungalow, Ahmedabad. As per the terms of the franchise agreement dated 21.9.1996, the entire amount collected by the Asset International Center towards the fees was first sent to Aptech alongwith all necessary details and particulars. Aptech and their auditor, after verifying and checking the details of the accounts submitted by GDR, used to retain 20% of the total amount and issued cheque in the name of GDR for the balance 80% of the amount.

2 (ii) Aptech started indulging into financial irregularities and acting contrary to the terms of franchise agreement dated 21.9.1996 and, therefore, Director of GDR personally visited the Regional Office of Aptech at Vadodara on 24.7.2001 to get the details of the amount due and payable by Aptech to GDR as per the terms of franchise agrement dated 21.9.1996. Aptech supplied the statement of accounts of GDR wherein it was found that an amount of Rs.33,13,634.07 paise was outstanding due and payable by Aptech to GDR as on 24.7.2001. Aptech not only supplied the statements of accounts to GDR but also verified and confirmed the details of the outstanding dues of Rs.33,13,634.07 paise as mentioned in the said statement of accounts. In other words, Aptech admitted and accepted its liability of Rs.33,13,634.07 paise which was outstanding due and payable to GDR.

2 (iii) It is further case of the complainant GDR that Aptech issued a cheque dated 24.7.2001 bearing No.825749

drawn on Dena Bank, Law College Branch, Ahmedabad in favour of the complainant GDR towards the outstanding dues. The said cheque was presented for encashment in the Central Bank of India, Gandhi Road Branch, Ahmedabad on 14.8.2001 and to the utter shock and surprise of GDR the said cheque was returned dishonoured on 17.8.2001 with an endorsement "account closed". It is further averred in the complaint that accused No.2 is the Chairman of Aptech, accused Nos. 3, 4, 5, 6 and 7 are Directors of Aptech, accused Nos.8 and 9 are Executive Directors, accused No.10 is the authorised signatory of accused No.1 Aptech and they are in charge and responsible to Aptech for the conduct of business of Aptech and all the accused are responsible for day-to-day conduct and affairs of Aptech at the time the offence was committed and, therefore, all the accused have committed a criminal offence under section 138 of the Act.

2 (iv) GDR had addressed a statutory notice to each of the accused under section 138 of the Act on 29.8.2001 and the same was sent by Registered Post A.D. Despite service of notice to each of the accused, no amount has been paid to GDR. It is further averred that instead of making the payment of the amount of cheque on receipt of statutory notice by Aptech, some of the accused have sent untrue and vague reply dated 12.9.2001 through their advocate.

2 (v) It is, therefore, the case of GDR that all of them have committed criminal offence under Section 138 of the Act and they are required to be dealt with sternly and adequately punished. GDR has also produced relevant documents with a separate list with the complaint. It is, therefore, prayed by GDR to issue process against the persons figured as the accused in the said complaint and to punish them in accordance with law for having committed an offence under Section 138 of the Act.

3. The learned Chief Metropolitan Magistrate, on receipt of the complaint, examined the complainant on oath and on satisfying, has issued process only against accused Nos.1 to 4 and 10 named in the complaint. It is this order of issuance of process against accused Nos.1 to 4 and 10 only which has given rise to the present petition at the instance of accused Nos.1 to 4 only who are petitioners before this Court.

4. By filing this petition, petitioners have contended that they are innocent and have not committed any offence as alleged. It is further contended that no amount was outstanding to be paid to the complainant GDR.

That a cheque had been stolen or surreptitiously obtained by GDR and the same has been misused, though GDR was fully knowing that the account with Dena Bank being No.602 was closed long back for which an intimation was also received by GDR. It is also contended that a franchise agreement was entered into between Aptech and GDR at Mumbai and as per the agreement it covered only Ahmedabad territory at C.G. Road. A bank account for that centre is separately got opened. So far as another centers are concerned, separate agreements for each canters are executed. However, the Regional office of Aptech is at Vadodara. So far as the Directors are concerned, the administration was being looked after by the staff at Vadodara as no office of Aptech is at Ahmedabad. Petitioner No.2 who is the Chairman and petitioners Nos.3 and 4 who are Directors are not in any way concerned with the Management of Ahmedabad Territory as they are permanently residing at Mumbai and are concerned with the Head Office. It is further averred that according to the franchise agreement, Aptech has to appoint internal auditor who is making audit of each centre on weekly basis and after auditing the same the Auditor has to issue the cheque to the franchisee by signing the said cheque as authorized signatory upto the limit of Rs.1.00 lac and in all 5 cheques can be issued.

4 (i) According to the petitioners, certain relevant dates and facts are very material to show their bonafide and to prove their innocence upon which much assertion have been made. They are as under:

07.04.1999 Mr. Darshit R. Joshi was appointed by Aptech as Internal Auditor to do the audit work of GDR. Copy of appointment letter is annexed at Annexure C to the petition.

11.04.1997 Mr. Darshit Joshi confirmed his appointment by giving his consent. A copy of confirmation letter is annexed at Annexure D to the petition.

Therefore from 11.4.1997 Mr. Darshit Joshi who is a Chartered Accountant was Authorized Signatory on behalf of Aptech who continued as such upto 28.4.2000.

17.04.2000 The Board of Directors of Aptech passed a resolution to appoint new Auditor Mr. Sanjay V. Shah as Internal Auditor as the Company decided to centralise its internal audit. From that date i.e.,

17.04.2000 Mr. Sanjay V. Shah became the Authorized Signatory for operation of the current Account No.602 maintained with Dena Bank, Law Garden ...(College) Branch.

17.04.2000 A resolution was passed fixing the authority of the Auditor who is also appointed as Authorized signatory. By that resolution a limit was fixed to issue a cheque of RS.1.00 lakh only. A copy of said resolution dated 17.4.2000 is annexed at Annexure E to the petition.

05.05.2000 Mr. Sanjay Vastupal Shah was appointed and appointment letter was issued. A copy of appointment letter is annexed at Annexure F to the petition.

10.06.2000 Mr. Sanjay Vastupal Shah took over the charge from Mr. Darshit Joshi and he took in writing from Mr. Darshit Joshi in which he specifically stated that no amount is outstanding/pending till 31.5.2000. On that day Mr. Darshit Joshi handed over the blank cheque book from cheque No.779758. A copy of the letter is annexed at Annexure G to the petition.

26.04.2001 The Board of Directors passed a resolution for closure of the Bank Account No.602 with Dena Bank. A copy of the said resolution dated 26.4.2001 is annexed at Annexure H to the petition.

23.05.2001 A letter/intimation was given to Mr. Sanjay V. Shah, the Auditor to initiate necessary action for closure of Bank A/c. No. 602. A copy of the said letter is annexed at Annexure I to this petition.

A copy of the letter intimating GDR about the closure of the Bank A/c. is annexed at Annexure J to the petition.

26.06.2001 Before closing of the said account with Dena Bank, the accounts with GDR were settled and the amount of Rs.5770/- was received by Aptech and pursuant to that a receipt was passed in favour of GDR towards the full and final settlement of

accounts. A copy of the said receipt is annexed at Annexure R to the petition.

24.07.2001 As per the complaint, GDR came in possession of the cheque in question.

14.08.2001 The said cheque was presented for encashment by GDR.

17.08.2001 The cheque was received dishonoured with an endorsement "Account closed".

29.08.2001 Statutory Notice under section 138 of the Act to each of the accused of Aptech was issued.

12.09.2001 Aptech and other accused persons jointly replied to the statutory notice under section 138 of the Act.

19.09.2001 On receipt of the notice Mr. Darshit Joshi gave an application/complaint regarding the misuse of the cheque in which he had categorically stated that he had never signed any cheque, more particularly the cheque in dispute. On the same date he filed an affidavit stating the contents as mentioned in the application/complaint. Copies of the said complaint and the affidavit are annexed at Annexures L and M respectively to the petition.

Mr. Darshit Joshi also gave another affidavit to Aptech stating the same facts. A copy of the said affidavit is annexed at Annexure N to the petition.

18.9.2001 Mr. Sanjay V. Shah also filed an affidavit, a copy of which is annexed at Annexure O to the petition.

4 (ii) It is further say of the petitioners that in the complaint and affidavit filed by Mr. Darshit Joshi to the effect that he had not issued any cheque and he tried to find out another cheque i.e., cheque bearing No. 825750 but he could not find the same and, therefore, with a view to prevent the misuse of the cheque No. 825750 he requested to take preventive action. Mr. Sanjay Shah has also stated in his affidavit that the cheques bearing No. 825749 and No. 825750 are neither sent by him nor issued by him to anybody. Therefore from

these documents it becomes clear that in an old cheque book which was treated as empty, unfortunately two cheques remained unused, out of which one cheque has been misused in the present complaint. The bank account from which this cheque was issued was closed down long back i.e., 23.5.2000 and GDR was also intimated about the same. The accounts with GDR were also settled and the amount of Rs.5770/- which was due to be paid to Aptech was received by Aptech and the receipt was also issued. From the complaint and affidavit filed by Darshit Joshi and Sanjay Shah, it also becomes clear that they have not signed cheque bearing No. 825749. In any case, when the bank account was closed long back and intimation with regard to that was given to GDR, Aptech would not have issued a cheque from the closed account. The use of a cheque of closed account itself is suggestive of the fact that the said cheque has been received fraudulently and a fraud has been played by GDR with some malafide intention.

4 (iii) It is also highlighted in the petition that GDR had their internal disputes and the said disputes were going on since September 2000. Various complaints and suits were filed by the Directors of GDR against each other. Due to their internal disputes they have not made payment of loans obtained from Social Co-operative Bank Limited and, therefore, the Social Cooperative Bank Limited had filed Summary Suit No.1221 of 2000 before the Court No.3 of Board of Nominees, wherein also they themselves have prayed to seal the premises of GDR where the Centre of Aptech was running. It is also stated that one complaint is also filed by the Director which is registered as Inquiry No.54 of 2001 dated 14.5.2001 before Anti Economic Offences Cell. The said department has asked for details of transaction with Aptech vide their letter dated 28.8.2001. It is, therefore, the case of the petitioners that from the aforesaid facts it becomes clear that GDR has malafidely obtained the cheque or dishonestly got the custody of alleged cheque in question and it is very well within the knowledge of GDR that the said cheque would return with an endorsement of 'account closed' as the GDR was knowing that Aptech has closed their account and, therefore, GDR deposited the said cheque by making alterations and putting the name of GDR company and also filling in the figure which it obtained from Regional office of Aptech and as the said cheque is dishonoured the GDR issued notice and only after receipt of the said notice Aptech came to know that GDR had deposited the cheque in question which is not at all issued to GDR by the authorized signatory of Aptech.

4 (iv) The petitioners immediately gave reply through their advocate to the statutory notice issued by GDR dated 29.8.2001. In this reply it is clearly stated that GDR has concocted the story to extract huge sum of money from Aptech and no amount is due and payable to GDR. It is also denied about the issuance of cheque and it is specifically stated that the cheque deposited by GDR is forged one. Despite this fact GDR filed the criminal complaint against the petitioners.

4 (v) It is also the case of the petitioners that petitioner No.2 is Chairman of Aptech and petitioner Nos.3 and 4 are Non-Executive Directors of petitioner No.1 Aptech. At the time of issuance of process the learned Chief Metropolitan Magistrate has not issued process against accused Nos.5 to 9. Therefore there is no material produced before the learned Magistrate through which it can be said that petitioner Nos.3 and 4 are the Working Directors and are incharge of day-to-day affairs of Aptech and, therefore, the process issued against petitioner Nos.3 and 4 is illegal. Therefore if it is presumed that the cheque in question was issued even then the Directors of Aptech cannot be held responsible as it is issued by accused No.10 as the Authorized Signatory of petitioner No.1 Aptech, as the authorized signatory is the internal auditor, who after verifying the documents, issued the cheque and, therefore, the Directors have no knowledge about the settlement of accounts.

4 (vi) It is further submitted that by passing resolution, the authorized signatory has been given authority to issue the cheque upto the limit of Rs.1.00 lac and therefore even the authorized signatory is not entitled to issue cheque for an amount above the limit of RS.1.00 lakh while the cheque in question is of Rs.33,13,634.07 paise and it is signed by the authorized signatory. Therefore if it is presumed that the cheque in question is issued even in that case also the Directors of Aptech cannot be held responsible as Aptech has authorised accused No.10 - authorised signatory to issue a cheque upto Rs.1.00 lakh and therefore only against him the case can be proceeded.

4 (vii) Lastly it is submitted that by virtue of the proviso to section 141 of the Act the petitioners cannot be said to have been committed any offence under section 138 of the Act as no knowledge can be imputed to the petitioners and, therefore, it is prayed to quash and set aside the complaint as well as the process issued thereunder by the learned Chief Metropolitan Magistrate,

Ahmedabad.

5. The petition is hotly contested by respondent No.2 GDR by filing affidavit which is sworn by Dhiraj Manilal Thakkar, Director of GDR Securities Limited.

5 (i) It is inter alia stated therein that Mr.Ashish Jain, Regional Manager of Aptech in collusion with (1) Mr. Darshit Joshi, Chartered Accountant, (2) Mr. Sanjay Vastupal, Chartered Accountant, (3) Malay Shirish Pandit, Chartered Accountant and (4) Mr. Bhavik Shirish Pandit has indulged into the act of misappropriation of funds of GDR to the tune of Rs.33,05,672/- On 8.5.2001 GDR has filed a criminal complaint being Inquiry Case No.54/2001 before the Anti-Economic Offences Cell, Crime Branch, Meghaninagar, Ahmedabad against the above referred to 5 persons for offences under sections 403, 406, 420 and 120-B of the IPC and the said complaint is under investigation. In pursuance of the aforesaid criminal complaint, detailed investigation has been carried out by Dy.SP CID Crime, Anti-Economic Offences Cell, Gujarat State, Ahmedabad and the said investigation is still in progress. During the course of the above referred to investigation, Aptech had furnished statement of accounts maintained by it to the Investigating Officer and a copy of the said statement of accounts was also supplied to GDR. On perusal of the said statement, it becomes clear that an amount of RS.33,13,634.07 is legally payable and due to GDR.

5 (ii) It is denied by GDR that it has ever been intimated about the closing of account No.602 with Dena Bank, Law Garden Branch, Ahmedabad as alleged.

5 (iii) It is also asserted that on 18.12.2000 a seal has been applied by Court Commissioner at the instance of Bhavik Shirish Pandit in the proceedings of Lavad Case No.1221 of 2000 filed by the Social Cooperative Bank, Khamasa Branch, Ahmedabad before the Registrar, Board of Nominees Court at Ahmedabad. It is further stated that the petitioners themselves have stated in para 3 (k) of the petition on page 16 that seal has been applied to the premises of GDR where the centre of Aptech was running. Thus, it is within the knowledge of Aptech that the premises of registered office of GDR is closed.

5 (iv) It is also emphasised that on 27.11.2000 GDR had addressed a letter to the Regional office of Aptech Limited at Vadodara and had requested that all correspondence be addressed to GDR Securities Limited at 2235, Mahurat Pole, Manek Chowk, Ahmedabad.

5 (v) It is also high-lighted that the share holders of GDR vide resolution dated 27.1.2001 have removed Mr. Bhavik Shirish Pandit as a Director of GDR. It is further stated that the intimation of the removal of Mr. Bhavik Shirish Pandit as a Director of GDR Securities Limited vide resolution dated 27.1.2001 passed by the share holders of the company was sent to Aptech for information on 22.2.2001.

5 (vi) It is further stated that according to the petitioners, the intimation about closure of the Bank Account No.602 maintained with Dena Bank, Law Garden Branch, Ahmedabad was given vide letter dated 23.5.2001 addressed to Mr. Bhavik Pandit produced by the petitioner at Annexure J on page 100 of the memo of petition and on perusal of the said letter it can be seen that the said letter has been addressed to Mr. Bhavik Pandit who is shown to be a Director of GDR. It is stated that it is well within the knowledge of Aptech that Mr. Bhavik Shirish Pandit has been removed as a Director of GDR vie resolution dated 27.1.2001 and intimation in that regard has also been sent to Aptech vide letter dated 22.2.2001.

5 (vii) It is also denied that the internal auditor who was the authorized signatory was authorized to sign the cheques on behalf of Aptech to a limit of Rs.1 lac per cheque vide resolution dated 17.4.2000.

5 (viii) It is asserted that GDR has filed a criminal complaint being Inquiry No. 54 of 2001 before the Anti Economic Offences Cell, Crime Branch, Meghaninagar, Ahmedabad, on 8.5.2001 against the Regional Manager of Aptech and others for offence under sections 403, 406, 420 and 120-B of IPC.

5 (ix) It is also claimed that a notice regarding dishonour of cheque was sent to the petitioners on 29.8.2001 and the same is duly served upon them. It is also stated that Aptech knowing fully well that GDR filed a criminal complaint against the petitioners for the offence under section 138 read with section 141 of the Act have resorted to strange proceedings of filing Civil Suit No.4352/2001 in the City Civil Court at Ahmedabad inter alia praying that pending hearing and final disposal of the suit, defendants may be restrained from taking any action of whatsoever nature pursuant to cheque No.825749 or any other cheque/s and restraining the defendants from taking any action of whatsoever nature pursuant to the cheque No.825749 or any other cbeque/s,

documents, papers in their possession in respect of transaction as a franchisee of Aptech. In the said suit, Aptech has joined Bhavik Pandit as defendant No.5 knowing fully well that Bhavik Pandit has been removed as a Director of GDR vide resolution dated 27.1.2001 passed in the meeting of the share holders of GDR. It is therefore urged that the said civil suit is not tenable in the eyes of law and prayers made therein cannot be granted. Therefore, filing of the suit appears to be chosen with a view to show that the dispute is of a civil nature and civil suit has already been filed by Aptech against GDR. Therefore Aptech has failed to point out prima facie case to exercise powers under section 482 of the Code by this Court for quashing the criminal complaint No. 918 of 2001 pending in the Court of Chief Metropolitan Magistrate, Ahmedabad and hence the present petition deserves to be dismissed with costs.

6. Mr. Anandjiwala, learned advocate for the petitioners, while referring to the pleadings which are exhaustively narrated by this Court in foregoing paragraphs, contended that there is no prima facie case against the petitioners for commission of the alleged offence under section 138 of the Act. It is emphasized by the learned advocate that the averments made in this petition are eloquent and speaks the volumes of non-disclosure of offence. However, the complaint came to be filed and process came to be issued thereunder and, therefore, the same deserves to be quashed and set aside. What is highlighted by the learned advocate is that there is a franchise agreement between the parties and therefore there is a civil dispute which can be tried and decided by civil court. The cheque bearing No.825749 was never signed by the authorized signatory nor it was issued by Aptech to GDR. A blank cheque was used by GDR and since the bank account of Aptech was closed long back, which is within the knowledge of GDR that itself is suggestive of the fact that the said cheque has been received fraudulently and fraud has been played by GDR with some malafide intention. It is also asserted by the learned advocate that petitioner Nos.2 to 4 are residents of Mumbai and they are not in-charge of day-to-day management of Aptech and, therefore, the process issued against them deserves to be quashed. It is further highlighted by the learned advocate that the amount of RS.33,13,635.07 paise was never outstanding to GDR by the Aptech and, therefore, process issued against Aptech is also deserved to be quashed. In sum and substance, the contention of the learned advocate centers round that on having perusal of the complaint itself suggest that prima facie no offence has been committed by the petitioners as

alleged against them and since it is misuse of process of law by GDR, same is required to be quashed and set aside by allowing this petition.

7. In support of the aforesaid contention, Mr. Anandjiwala relied upon following judgments:

(i) Municipal Corporation of Delhi v. Ram Kishan Rohtagi and others, (1983) 1 SCC 1 = AIR 1983 SC 67.
(ii) Madhavrao Jiwajirao Scindia and others v. Sambhajirao Chandrojirao Angre and others, (1988) 1 SCC 692.
(iii) G. Sagar Suri and another v. State of U.P. and others, (2000) 2 SCC 636.
(iv) Satish Mehra v. Delhi Administration and another 1996 SCC (Cri.) 1104.

8. Mr. Buddhbhatti, learned advocate for respondent No.2 - GDR contended that the complaint discloses all the ingredients of offence under section 138 of the Act. Moreover, the affirmation of the complainant on solemn affirmation has been considered and after applying mind the learned Chief Metropolitan Magistrate has issued process. It is also asserted by the learned advocate that whatever averments made in the memo of petition are in the nature of defence which cannot be considered in a petition filed under section 482 of the Code as the same can be considered at the time of trial and it is too premature to judge the defence before the same is lead and probabilised. It is also emphasised that there is a legal presumption that debt is payable when cheque is issued and burden is on the other side to prove contrary by leading legal and reliable evidence. It is also contended that the law on quashing is now crystallized by Apex Court in various pronouncements. It is contended that quashing remedy under section 482 of the Code is extraordinary in nature and it is to be resorted to in rarest of rare case and most sparingly. It is also pointed out that since defence cannot be looked at the pre-trial stage, the Court exercising powers under section 482 of the Code has to see and peruse the complaint only and documents produced by the accused in defence cannot be considered by the High Court while deciding petition filed for quashing under section 482 of the Code. Therefore, it is prayed that there is no substance in the challenge made in the petition. The learned Chief Metropolitan Magistrate has rightly issued the process only against Aptech and its Chairman and two Directors and authorized signatory which does not warrant any interference by this Court in exercise of powers

under section 482 of the Code and hence the petition deserves to be dismissed with costs.

9. In support of the aforesaid contentions, Mr. Buddhbhatti, learned advocate for respondent No.2 GDR has relied upon the following judgments:

(i) M/s. Bilakchand Gyanchand Co. v. A. Chinnaswami, 1999 Cri.L.J. 3498.(S.C.)
(ii) Minoo F. Bulsara v. Hindustan Petroleum Corporation and another, 1997 Cri.L.J. 168. (Bombay High Court)
(iii) Modi Cements Ltd. v. Kuchil Kumar Nandi, 1998 (2) GLR 1620.(S.C.)
(iv) Anchor Capitals of India Limited and another v. State of Gujarat and another, 1998 (3) GLR 1973. (Gujarat High Court)

10. Mr. ND Gohil, learned APP who appears on behalf of respondent No.1 - State has supported the submissions advanced by Mr. Bhudbhatti, learned advocate for respondent No.2 and further contended that the learned Chief Metropolitan Magistrate has rightly issued process after recording verification of the Chairman of the GDR which does not warrant any interference by this Court in exercise of powers under Section 482 of the Code and, therefore, prayed to dismiss the petition.

11. I have considered the submissions advanced by the learned advocates appearing or the parties. I have perused the averments made in the memo of petition which are stated on oath, affidavit in reply filed by respondent No.2 sworn by its Chairman, affidavit in rejoinder filed by the petitioners which is sworn by Ashit Sheth, relevant documents annexed with the petition, reply affidavit and the judgments cited at the bar.

12. Since the decision of Privy Council in Khwaja Nazir Ahmed (King Emperor) v. Khwaja Nazir Ahmed (1944) 711A203: AIR 1945 PC 18: 1945 (46) Cri LJ 413 and till this day there is existing one salutory principle that in normal circumstances, the law Courts would not thwart any investigation and criminal proceedings initiated must be allowed to have its own course under the provisions of the Code. The powers of the police ought to stand unfettered to investigate cases where they suspect or even have reasons to suspect the commission of a cognizable offence and the First Information Report (F.I.R.) discloses of such offence. The Judicial Committee in the decision of Nazir Ahmed (supra)

observed:

> "In their Lordship's opinion, however, the more serious aspect of the case is to be found in the resultant interference by the Court with the duties of the police. Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry. In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under S. 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus. In such a case as the present, however, the Court's functions begin when a charge is preferred before it, and not until then."

13. It is paramount to note however that the observations of Lord Porter in Nazir Ahmed (AIR 1945 PC 18: 1945 (46) Cri LJ 413) stands qualified by inclusion of the following:

> "No doubt, if no cognizable offence is disclosed and still more, if no offence of any kind is disclosed, the police would have no authority to undertake an investigation."

14. The qualified statement of the Judicial Committee however, stands noted in Sanchaita Investment (State of West Bengal v. Swapan Kumar Guha (1982) 1 SCC 561: (AIR 1982 SC 949: 1982 Cri LJ 819). Incidentally, Sanchaita Investment and subsequent decisions including Bhajan Lal

(State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335: (1992 AIR SCW 237: AIR 1992 SC 604: 1992 Cri LJ 527) and Rajesh Bajaj (Rajesh Bajaj v. State NCT of Delhi, 1999 Cri LJ 1833: (1999 AIR SCW 881: AIR 1999 SC 1216) in one tune stated that if an offence is disclosed the Court will not interfere with an investigation and will permit investigation into the offence alleged to have been committed. If, however, the materials do not disclose an offence, no investigation should normally be permitted.

15. In Sanchaita Investment (supra) the Supreme Court has been candid to record that it will be the duty of the Court to interfere with any investigation and to stop the same to prevent any kind of uncalled for and unnecessary harassment to an individual if the Court on a consideration of relevant materials is satisfied that no offence is disclosed. Therefore in the event the FIR does not disclose an offence, question of continuation of the investigation would not arise, since the same would be an utter abuse of the process of Court and a harassment, which is unknown to law.

16. In Rajesh Bajaj's case (supra) the Supreme Court however, without a contra note detailed the method of construing the document (First Information Report) and stated in para 9 of the judgment as follows:

> "It is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Nor is it necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent. Splitting up of the definition into different components of the offence to make a meticulous scrutiny, whether all the ingredients have been precisely spelled out in the complaint, is not the need at this stage. If factual foundation for the offence has been laid in the complaint the Court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one or two ingredients have not been stated with details. For quashing an FIR (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence. In State of Haryana v. Bhajan Lal, 1992 AIR SCW 237: (AIR 1992 SC 604: 1992 Cri LJ 527) (supra) this Court laid down the

premise on which the FIR can be quashed in rare cases. The following observations made in the aforesaid decisions are a sound reminder (para 109 of AIR):

> "We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice."

(Reported decisions mentioned in above referred to paragraphs 12 to 16 have been taken verbatim from the reported decision of the Supreme Court in the case of S.M. Datta v. State of Gujarat, 2001 AIR SCW 3133.)

17. Keeping in forefront the ratio laid down by the Supreme Court in the above referred to judgment, now turning attention on to the factual aspects of the matter, it appears that there is no dispute that GDR had entered into a franchise agreement with petitioner Aptech on 21.9.1996 and in connection with that agreement the complainant GDR started a computer centre at the address given in the complaint wherein procedural aspect of collection of fees and distribution of amount between Aptech and GDR is stated and as per the said agreement, Aptech has to retain 20% of the total amount and to issue cheque for the remaining 80% of the amount to GDR.

18. It is also the case of GDR that Aptech started indulging into financial irregularities and started going contrary to the franchise agreement dated 21.9.1996. It is also alleged in the complaint that the Director of GDR visited the Regional Office of Aptech at Vadodara for getting details of the accounts and as per the statement of accounts, an amount of Rs.33,13,634.07 as alleged was outstanding due as on 24.7.2001. It is also alleged in the complaint that GDR has verified the accounts and Aptech has issued cheque bearing No. 825749 dated 24.7.2001 for Rs.33,13,634.07 drawn on Dena Bank, Law Garden Branch, Ahmedabad. There is no dispute about the fact that the said cheque was presented on 14.8.2001 for clearance which was dishonoured on 17.8.2001 with the endorsement "account closed". Therefore GDR has issued a

statutory notice dated 29.8.2001 under Section 138 of the Act to each of the accused named in the complaint. Despite service of notice, no amount was paid to GDR by Aptech. In the aforesaid backdrop of the factual aspect, the complaint came to be lodged against Aptech Company, its Directors and authorized signatory.

19. The petitioner - Aptech has raised various contentions in the memo of petition which have been narrated at length in the foregoing paragraphs of this judgment. Therefore, I need not again embark upon the same.

20. The contention that the cheque dated 24.7.2001 bearing No.825749 for Rs.33,13,634.07 drawn on Dena Bank, Law Garden Branch, Ahmedabad, in favour of GDR towards its alleged outstanding dues issued by Darshit Joshi who was internal auditor and authorized signatory was not binding to the petitioners as the authorised signatory was empowered to issue cheque upto the limit of Rs.1 lac only and said Darshit Joshi has been removed with effect from May 10, 2000 as internal auditor and thereafter Sanjay Vastupal was engaged in place of Darshit Joshi as an internal auditor and, therefore, alleged cheque issued by Darshit Joshi as an authorized signatory is not binding to Aptech and its Directors, has no substance. Since this is an in-house arrangement and procedure of Aptech which has nothing to do with the outstanding dues of GDR. As per section 138 of the Act, once a cheque is issued by authorised signatory on behalf of company it not only binds the company but its directors as well. At the most it can be said that it is a defence which can be examined during the course of inquiry and trial.

21. The contention that fraud has been played with a view to get liability against Aptech has also no substance as it is a matter of appreciation of evidence whether GDR has played fraud with a view to create liability against Aptech by showing the dues which were legally enforceable debts against Aptech.

22. The contention that the learned Chief Metropolitan Magistrate issued process against Aptech, its three directors and authorised signatory who are accused Nos.1 to 4 and 10 respectively whereas no process has been issued to rest of the directors who are shown as accused Nos.5 to 9 itself prima facie sufficient to establish that the learned Chief Metropolitan Magistrate has not applied his mind while issuing process, has no substance. According to me, on the contrary, the learned Magistrate has correctly appreciated the complaint as it

is as well as the verification given by the complainant and recorded by him and on the basis of the averments made in the complaint and the verification which reveal that Aptech is a company, petitioner No.2 is the Chairman of the company and petitioner Nos.3 and 4 are its Directors who are accused Nos.2 to 4 whereas accused No.10 shown in the complaint is authorised signatory. Therefore, the learned Magistrate has issued process only against accused Nos.1 to 4 and 10 of the complaint.

23. The contention that the petitioner Nos.2 to 4 are permanent residents of Mumbai and, therefore, they are not managing the day-to-day affairs of the company and the alleged cheque which was issued by authorized signatory was not within their knowledge and hence by virtue of the proviso contained in sub-section (1) of Section 141 of the Act, petitioner Nos.2 to 4 are not liable to be punished for the alleged offence has also no substance in view of the fact that in paragraph 9 of the complaint it is stated that petitioner No.2 is the Chairman of Aptech and petitioner Nos.3 and 4 and others are Directors of petitioner No.1 Aptech and, therefore, they are in-charge and responsible to the Aptech for the conduct of the business of the company and all were responsible for day-to-day conduct of the Aptech at the time when the offence was committed and therefore all of them have committed offence under Section 138 of the Act. Not only that, when the cheque was dishonoured, a statutory notice under section 138 of the Act was issued to each of the accused in the complaint on 29.8.2001 by Registered Post AD. It may be noted that the submission that petitioners Nos.2 to 4 were not involved in the day-to-day management of Aptech and the issuance of the cheque in question was not within their knowledge has to be proved during the course of inquiry and trial and, therefore, this submission/contention is their defence only which cannot be examined in the petition filed for quashing of the FIR under Section 482 of the Code.

24. It may be appreciated that the ratio of the reported decisions cited by Mr. Anandjiwala, learned advocate for the petitioners to which reference is made in earlier paragraphs of this judgment, rested on the facts of those cases. In all the cited reported decisions, the Supreme Court has unequivocally held that if a complaint or FIR does not disclose any offence, question of continuation of investigation would not arise since the same would result into uncalled for and unnecessary harassment which is unknown to law. It is also ruled by the Supreme Court that it is not necessary that a complainant should verbatim reproduce in the body

of his complaint all the ingredients of the complaint he is alleging nor it is necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent. Therefore it is not necessary to refer to all the judgments cited by Mr.Anandjiwala as in all these judgments the Supreme Court has reiterated the same principle which is stated hereinabove.

25. In the case of Minoo F. Bulsara (supra) relied upon by Mr. Buddhbhatti, learned advocate for respondent No.2 - GDR, the Bombay High Court has stated that court has to rely on the allegations in the complaint, documents and evidence in support of the complaint but the defence version or defence documents can not be considered at the stage when the accused moving court for quashing process. In internal para (4) of para 4 of the reported decision the Bombay high Court has observed as under:

> "The defence version or the defence documents cannot be considered at this stage. The Apex Court has pointed out in AIR 1976 SC 1947 : (1976 Cri LJ 1533) that at this stage the Court cannot consider the defence of the accused and the defence documents. Similar view is taken by the Apex Court in AIR 1992 SC 1379: (1992 Cri LJ 1956). It is, therefore, seen that the position of law is that the Court will have to consider only the allegations in the complaint and the materials produced by the complainant to find out whether any criminal offence is made out for which the issuance of the process is justified or not. If on reading the allegations in the complaint and the materials produced by the complaint, it is found that no criminal offence is made out or if the defence of bona fide civil dispute can be spelt out from those materials, then certainly this Curt can quash the proceedings."

26. In the case of Modi Cements Limited (supra), relied upon by Mr. Buddhbhatti, learned advocate for respondent No.2, the Supreme Court has stated that once a cheque is given in satisfaction of a debt and the same is returned for insufficient funds and the holder of cheque gives due notice and if even after such notice the payment is not made, there is presumption of the offence having been committed. The onus is on the accused to rebut that presumption. At this stage it will not be proper for the High Court to intervene under Section 482

of the Code.

27. In the case of Anchor Capitals of India Limited and another (supra), relied upon by Mr. Buddhbhatti, learned advocate for respondent No.2, this Court has held that if the allegations in the complaint and accompanying documents indicate that cheques were issued towards such discharge, merely because this aspect is not specifically mentioned in the complaint would not render the complaint invalid.

28. In the latest decision of the Supreme Court in the case of S.A. Nanjundeswara v. M.S.Varlak Agrotech Pvt. Ltd., 2002 AIR SCW 4, the Supreme Court has held that in a complaint filed for offence under section 138 of the Act if statements taken on the face value make out an offence, quashing of proceedings by High Court by trying to shift material on record, in exercise of powers under section 482 of the Code is erroneous.

29. In another latest decision of the Supreme Court in the case of A.V. Murthy v. B.S. Nagabasavanna, 2002 AIR SCW 694 the Supreme Court has held that dismissal of complaint on the ground that cheque drawn was in respect of a debt or liability, which was not legally enforceable is illegal and erroneous. In the said case the complainant had alleged that cheque was drawn to pay back amount advanced by complainant four years back. The High Court quashed the complaint at the threshold on the ground that as amount was advanced four years prior there was no legally enforceable debt. While setting aside the judgment of the High Court, the Supreme Court has further observed that consideration for cheque is presumed under Sections 118 and 139 of the Act. Moreover, drawer in his balance sheet prepared for very year, had shown the amount as deposits from friend and this may amount to acknowledgment.

30. Applying the principles enunciated by the Supreme Court in above referred to judgments with regard to quashing of the proceedings of complaint or FIR in exercise of powers conferred under Section 482 of the Act to the facts of the present case what is emerged from the above discussion is that:

(i) Complaint discloses all the ingredients of offence under section 138 of the Act;
(ii) Affirmation of the complainant on solemn oath has been considered and after applying judicial mind the learned Chief Metropolitan Magistrate has issued process only against accused Nos.1 to 4 and 10 who are Aptech

Company, Chairman, Directors and authorised Signatory.

(iii) All the averments made in the memo of petition and submissions advanced during the course of hearing on behalf of the petitioners are defence which can be considered at the time of inquiry or trial and at this stage it cannot be considered as it cannot be presumed that the accused are telling the truth and complainant is telling falsehood and it is too premature to judge at this stage the evidence before the same is lead and probabilised.

(iv) The petitioners in reply to the notice have not raised any defence whatsoever and they have come out with conflicting and contradictory defence in their petition. Their defence is that the cheque book was stolen or was misused with connivance of their employee or it was given under pressure or it was not signed by authorized signatory. Thus various fanciful defences taken at the initial stage which are after thought and hence the same cannot be considered at this stage.

(v) The account was prepared and the same was approved by Chartered Accountant employed by Aptech. It is their own admission that they were indebted GDR to the tune of the amount mentioned in the cheque and they had given assurance that cheque would be honoured.

(vi) The cheque was issued to GDR at the Regional Office of Aptech at Vadodara and so there is no question of any forgery or theft of cheque.

(vii) The authorized signatory had issued the cheque for due discharge of legal debt payable to the GDR.

(viii) Aptech has not produced their accounts or certificate of their Chartered Accountant showing that nothing was due and payable to GDR.

(ix) There is legal presumption that debt is payable when cheque is issued and burden is on the other side to prove contrary by leading legal and reliable evidence.

(x) Aptech has produced an application given at Navrangpura Police station about missing cheque. How did they know about the same and forming part of record unless there was pre-planning and connivance with their own employee?

(xi) Aptech has furnished statement of accounts maintained by it to the investigating officer during the course of investigation with reference to criminal inquiry No.54 of 2001 wherein it is inter alia stated that an amount of Rs.33,13,634.07 paise is legally payable and due to GDR and therefore it is an admission of Aptech before investigating officer and now it wants to back out of the same by raising various defences.

(xii) The law is that quashment of complaint in exercise of powers under Section 482 of the Code or under Article 226 of the Constitution of India is an extra

ordinary power and it is to be resorted to in rarest of the rare cases and most sparingly and the same is now crystallized by the Apex Court in various decisions which have been dealt with at length in foregoing paragraphs.
(xiii) At this stage whether the complaint makes out a prima facie triable case against the accused is only to be seen and the defence of the accused cannot be looked into. The documents produced in defence by the petitioners cannot be considered while deciding the petition for quashing.

31. Seen in the above context, I am of the considered opinion that the petitioners have failed to make out prima facie case for quashment of the complaint and therefore there is no valid reason or justifiable ground to quash the criminal complaint No.918/2001 and the process issued thereunder by the learned Chief Metropolitan Magistrate, Ahmedabad, in exercise of powers conferred under Section 482 of the Code by this Court and hence the petition deservers to be rejected at the admission stage.

32. For the foregoing reasons, the petition fails and accordingly it is rejected at the threshold. Notice is discharged. Ad-interim relief stands vacated.

33. It is made clear that none of the observations made hereinabove by this Court while deciding this petition shall be construed as an expression of opinion on the merits or demerits of the case. The learned Magistrate before whom the matter comes up for trial shall decide the same in accordance with law and uninfluenced by the fact that the petitioners had filed petition for quashment of the complaint and the same has been rejected by this Court.

(A.M. Kapadia, J.)

34. At this stage, Mr. Anandjiwala, learned advocate for the petitioners, urged that interim relief which was granted at the time of issuing notice and which has remained operative till today may be ordered to remain operative for a further period of four weeks so as to enable the petitioners to approach higher forum. Mr. Buddhbhatti, learned advocate for respondent No.2 original complainant strongly objected to the grant of the prayer made by Mr. Anandjiwala on the ground that the complaint came to be filed in the month of September 2001 and because of the ad-interim relief granted by this Court further proceeding of Criminal Complaint No. 918 of 2001 has been stayed for the last ten months.

Therefore the prayer made by Mr. Anandjiwala may not be granted.

35. It is true that the complaint came to be filed in September 2001. This Court entertained the petition on 29.1.2001 and while issuing notice, ad-interim relief was granted and from that day onwards the ad-interim relief was operating in favour of the petitioners and against respondent No.2. It is equally true that the complaint filed for the commission of offence under section 138 of the Act is an extraordinary speedy remedy which was enacted with laudable object that the debts may be recovered by the creditor as early as possible. Besides this, this Court has rejected the petition merely by following the latest pronouncements of the Supreme Court on the law of quashment of complaint. Therefore granting of prayer made my Mr. An Anandjiwala would run counter to the settled principles of law enunciated by the Supreme Court on the point of quashment of complaint. In view of this, I am of the opinion that the prayer made by Mr. Anandjiwala cannot be entertained and hence the same is rejected.

(A.M. Kapadia, J.)

(karan)